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No. 99-321

In the Supreme Court of the United States

UNITED STATES OF AMERICA *ex rel.*
CAROL REA COOPER FOULDS,
Petitioner,

v.

TEXAS TECH UNIVERSITY AND
TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

TEXAS TECH RESPONDENTS' BRIEF IN OPPOSITION

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At issue in this case is whether the Eleventh Amendment's general prohibition against actions "commenced or prosecuted" by citizens against an unconsenting state bars an action brought by a private *qui tam* plaintiff under the federal False Claims Act. U.S. CONST. amend. XI; 31 U.S.C. §§3729–3732.

The False Claims Act permits private citizens who believe a "person" has submitted a false claim for payment to the United States to sue the perpetrator to impose a penalty for the

false claim, including treble damages. §§3729–3730. As an incentive, the private plaintiff receives a portion of the award. §3730(d). While the statute deters fraud by private contractors, the Eleventh Amendment prohibits applying the False Claims Act to unconsenting states. The False Claims Act contains no language waiving the Eleventh Amendment immunity of states and, in any event, Congress has no power to abrogate the states' Eleventh Amendment immunity under its Article I constitutional powers. *Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

SUMMARY OF THE ARGUMENT

The Eleventh Amendment prohibits suits "commenced or prosecuted" against the states by private citizens. U.S. CONST. amend XI. Suits against states brought by private relators under the *qui tam* provisions of the False Claims Act violate the states' immunity as sovereigns and offend their dignitary interest in avoiding the coercive process of federal judicial tribunals in suits brought by private citizens. Congress cannot circumvent the Eleventh Amendment's proscriptions by allowing private plaintiffs to "stand in the shoes" of the federal government. *Qui tam* suits are "commenced" and "prosecuted" by private citizens, and the potential intervention of the United States cannot change that fact.

Because the Court has already granted the petition for writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828, to resolve the issue presented by petitioner, the Court should hold this petition pending resolution of *Stevens* and then dispose of the petition as appropriate.[1]

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1. Respondents have also filed a conditional cross-petition that raises the "persons" issue also presented in the *Stevens* case.

ARGUMENT

I. ALLOWING PRIVATE CITIZENS TO BRING *QUI TAM* SUITS AGAINST THE STATES VIOLATES THE ELEVENTH AMENDMENT.

Subjecting the states to suits for money damages brought by private citizens under the *qui tam* provisions of the False Claims Act violates the Eleventh Amendment and the principles that motivated its passage. *See* 31 U.S.C. §§3729–3732; U.S. CONST. amend. XI. The Eleventh Amendment was enacted in a firestorm of protest shortly after the Supreme Court's decision in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which held that Article III authorized a South Carolina citizen to bring a private suit for damages against the State of Georgia. One of the Amendment's primary aims was to address the states' concern that "federal courts would force them to pay their revolutionary war debts, leading to their financial ruin." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821).

In addition to the concern with protecting the states' fisc, Eleventh Amendment jurisprudence also emphasizes the need to protect the integrity of the states as sovereign entities. *Hess*, 513 U.S. at 39. "The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (citing *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)). The purpose of the Eleventh Amendment was to prevent the indignity of subjecting states to suits by private parties in federal court. *Id.* (citing *In re Ayers*, 123 U.S. 443, 505 (1887)).

By seeking money damages from the states at the urging of private plaintiffs, *qui tam* suits accomplish exactly what the Eleventh Amendment forbids. The Court has recognized "that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). *Qui tam* suits brought by private citizens against the states are indistinguishable from other suits that impermissibly seek the payment of damages from a state's treasury. That the relator brings suit "on behalf of" the United States is irrelevant for Eleventh Amendment purposes. *See United States ex rel. Long v. SCS Bus. & Tech. Inst., Inc.*, 173 F.3d 870, 883-84 (CADC 1999), *petition for cert. filed*, 68 U.S.L.W. 3116 (U.S. Aug. 2, 1999) (No. 99-213). The *qui tam* relator's supposed representation of the United States' interests is a legal fiction that cannot justify granting a private plaintiff the United States's exemption from the Eleventh Amendment's protections. *See In re Fernandez*, 130 F.3d 1138, 1138 (CA5 1997) (holding that private successors to the FDIC may not "avoid the Eleventh Amendment by slipping into the shoes of the United States"); *see also West Virginia v. United States*, 479 U.S. 305, 311 (1987) (sovereign immunity is not at issue in suit by federal government against state); *United States v. Texas*, 143 U.S. 621, 646 (1892) (same). It is "as plain as the sun" that Petitioner was "commenc[ing] or prosecut[ing]" *qui tam* suits "against one of the United States" in violation of the clear dictates of the Eleventh Amendment. *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279, 289 (CA5 1999); *see also* U.S. CONST. amend. XI. The Eleventh Amendment's protections of state sovereignty cannot be circumvented so easily. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996).

When an action "is in essence one for the recovery of money from the state, the state is the real, substantial party in

interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Department of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *see also Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997). Even if the United States ultimately intervenes in the suit, that does not change the Eleventh Amendment analysis.[2] A private citizen is still commencing suit against the state for money damages. The Eleventh Amendment cannot countenance a private citizen's claim on state funds, regardless of whether the United States has joined the suit as a party.

II. CONGRESS HAS NOT CLEARLY ABROGATED STATE SOVEREIGN IMMUNITY IN THE FALSE CLAIMS ACT.

Congress did not attempt in the False Claims Act to clearly abrogate state sovereign immunity. *See Seminole*, 517 U.S. at 55-56; *Foulds*, 171 F.3d at 294. But even if Congress had clearly attempted to abrogate state sovereign immunity in the False Claims Act, it could not have validly done so. The Court has only allowed abrogation of state sovereign immunity under the Fourteenth Amendment. *Seminole*, 517 U.S. at 59, 63 (overruling the Court's short-lived holding to the contrary in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (plurality)). Congress enacted the False Claims Act under Article I of the Constitution, which the Court in *Seminole* held cannot be used to circumvent the Eleventh Amendment's limits on federal jurisdiction. *Id.* at 72-73; *see also United States ex rel. Stevens v. Vermont Agency of Nat. Resources*, 162 F.3d 195, 224 (CA2 1998) (Weinstein, J., dissenting), *petition granted*, (U.S. June 24, 1999) (No. 98-1828).

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2. The United States has not intervened in this suit, except to defend the constitutionality of the False Claims Act as applied to the states.

The pertinent analysis when state sovereignty is involved does not end with determining whether Congress has attempted to find a way to bypass the Eleventh Amendment, *i.e.*, by allowing a private party to vindicate "real party" rights of the federal government. Rather, the real question, as explained by the Court in *Seminole*, is whether Congress has the constitutional authority to do what it has done. *See Seminole*, 517 U.S. at 59; *see also City of Boerne v. Flores*, 117 S.Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act was not a proper exercise of Congress's Fourteenth Amendment enforcement powers). As the Fifth Circuit held and as the D.C. Circuit in *Long* has observed, "[*q*]*ui tam* plaintiffs cannot qualify as surrogates of 'responsible federal officers' who have the right to represent the sovereign to sue the respective states." *Foulds*, 171 F.3d at 293; *see Long*, 173 F.3d at 883.

Just as Article I provided no basis for the expansion of Article III in *Seminole*, the federal government's right to sue states cannot be expanded in opposition to the Eleventh Amendment by the device of *qui tam* suits. It is offensive to the Eleventh Amendment to use the states' surrender of sovereignty to the federal government to allow private parties to bring states into court and prosecute actions against them.[3]

Nor can the *qui tam* relator hide behind the jurisdictional skirts of the federal government. Private citizens cannot assume the federal government's right to sue states, which "is a narrow and nontransferable exception to the broad and

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3. One commentator has suggested that *qui tam* actions are the hidden source of power to allow Congress to render the Supreme Court law on abrogation meaningless and should be used routinely to vindicate federal rights. *See* Jonathan R. Siegel, *The Hidden Source of Congress' Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539 (1995).

fundamental constitutional principle of state sovereign immunity embodied in the Eleventh Amendment." *Stevens*, 162 F.3d at 214 (Weinstein, dissenting) (citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991)); *see also United States v. Texas*, 143 U.S. 621, 646 (1892) (recognizing the federal government's right to sue because states gave their consent in joining the union). This Court should require the United States to sue the states itself if, in the exercise of its supremacy, it determines that such a suit is required to preserve the "permanence of the Union." *Texas*, 143 U.S. at 644-45. The nature of dual sovereignty requires as much. "The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868).

If the *qui tam* device in the False Claims Act poses no constitutional problem, then Congress could set up any number of statutory devices to circumvent state sovereignty as long as there is a federal interest. Without Congress so stating, every Title IX, Title VI, and Section 504 case against a state would become a potential *qui tam* case, in which the plaintiff will demand, not actual damages, but a share of three times the federal funds received by the state for the past six years. Every public benefits class action involving federal funds could be a potential *qui tam* case.

The False Claims Act is unconstitutional—if applied to the states—because, through the *qui tam* device, it attempts to accomplish precisely what is forbidden by the Eleventh Amendment.

CONCLUSION

For these reasons, the Court should hold the petition for writ of certiorari pending resolution of the *Stevens* matter.

Respectfully submitted,

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